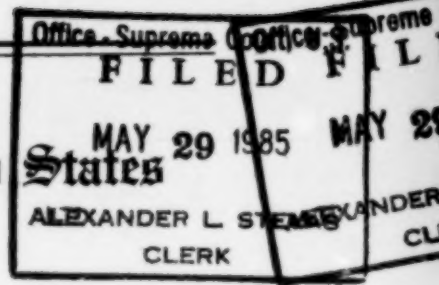


IN THE
Supreme Court of the United States
October Term, 1984



PACIFIC GAS AND ELECTRIC COMPANY,

Appellant,

v.

**PUBLIC UTILITIES COMMISSION OF THE
STATE OF CALIFORNIA, ET AL.,**

Appellees.

On Appeal From the Supreme Court of California

**BRIEF OF AMERICAN GAS ASSOCIATION AS
AMICUS CURIAE IN SUPPORT OF APPELLANT
PACIFIC GAS AND ELECTRIC COMPANY**

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BRIEF OF AMERICAN GAS ASSOCIATION AS
AMICUS CURIAE IN SUPPORT OF APPELLANT
PACIFIC GAS AND ELECTRIC COMPANY

The American Gas Association (A.G.A.) submits this brief *amicus curiae* in support of the Pacific Gas and Electric Company (appellant).¹

INTEREST OF THE *AMICUS CURIAE*

The American Gas Association (A.G.A.) is a national association representing the interests of approximately 300 member companies involved in the distribution and transmission of natural gas throughout the 50 states. These companies account for approximately 85 percent of all domestic utility sales of natural gas to consumers. The Appellant, Pacific Gas and Electric Company (PGandE), is a member of the A.G.A.

¹Written permission from the parties to this litigation to file this brief as *amicus curiae* has been obtained and has been filed with Clerk of this Court.

The California Public Utilities Commission (commission) has ordered that messages and solicitations for money of a private organization, Toward Utility Rate Normalization ("TURN"), must be included in four of PGandE's twelve monthly billing envelopes for a period of two years. Without discussion, the Supreme Court of the State of California denied review of this commission ruling.

The commission's order is of vital importance to most members of A.G.A. The order strikes at fundamental constitutional rights of privately owned utilities. The order is predicated upon interpretations of the scope of regulatory power over private property which have never before received judicial approval. Most seriously, it requires utilities to be associated with the communications of others and speak when they prefer to remain silent. It limits the ability of regulated utilities to communicate on issues important to those companies and their customers. It also nullifies the right of utilities to own and control certain of its property.

The concepts embodied in the commission's order have been adopted or are being promoted in other states.² Because

²The concept of government-mandated access to utility billing envelopes has recently prompted similar government action in the following states. Two state legislatures have authorized access to billing envelopes by Citizens Utility Boards (CUBs): *Wisconsin*, Wis. Stat. Ann. §199.10 (West 1984); *Illinois*, Ill. Ann. Stat. ch. 111 2/3, § 909 (Smith-Hurd 1984). On November 6, 1984, *Oregon* voters approved an initiative petition that requires utilities to include six CUB mailings over an unspecified period of time in their billing envelopes. J.S. App. 142-50. Bills were recently introduced in *Massachusetts*, H. 5756, 1984 Sess., and the *District of Columbia*, No. 5-546, 1984 Sess., to establish CUBs and permit access to billing envelopes. Citizens groups in *Nevada*, In re Investigation of Commission Jurisdiction over Extra Space in Utility Billing Envelopes, Docket No. 84-1129 (Nev. P.S.C. Jan. 7, 1985), and *Montana*, In re Joint Petition of Montana Citizen's Utility Board for Declaratory Ruling and Rulemaking, Order No. 5107 (Montana P.S.C. Dec. 24, 1984), have petitioned their respective commissions for access.

Note that the *New York* Public Service Commission in its Statement of Policy Governing the Access of Intervenor Organizations to the Extra Space in the Utilities' Billing Envelopes, No. 28655 (May 14, 1984),

of these threats to the fundamental First and Fifth Amendment rights of utilities, A.G.A. is filing this *amicus curiae* brief in support of PGandE.

SUMMARY OF ARGUMENT

This is a case of first impression. It presents a violation of the First Amendment guarantees of free speech and association and a violation of the Fifth Amendment guarantees of management prerogative rights and against the taking of property without compensation.

The commission identified specific public policy goals, (the assurance of full consumer participation in commission proceedings and a more complete understanding of energy-related issues); found them to be sufficiently compelling to justify limitations on First Amendment rights; ruled, in the absence of legal precedent and principled analysis, that a portion of the space in PGandE's billing envelope is the property of all PGandE's customers; and required that PGandE's billing envelope carry the messages and requests for money of a third party.³

By compelling PGandE to use its billing envelope to disseminate a third party's views and requests for money, the commission has violated the company's First and Fifth amendment rights.⁴ The regulatory power over privately owned businesses,

ordered access to billing envelopes by consumer representatives. On appeal to the New York Supreme Court, Albany County, the court found such order violated the First Amendment. *Consolidated Edison Company v. Public Service Commission of New York*, No. 10762/84 (April 10, 1985). Litigation concerning a state commission's authority to compel third-party access to utility billing envelopes is pending in: *West Virginia-Citizen Action Group v. Public Service Commission of West Virginia*, No. 16512 (S. Ct. App. W.Va. filed July 19, 1984).

³These public policy goals may be laudable, but A.G.A. believes that they are obtainable by other means not violating constitutional guarantees.

⁴While the Jurisdictional Statement formally presented only the First Amendment issue, there is no limitation on this Court's plenary powers to inquire into reasonably related issues, or to correct plain error.

even if affected with a public interest, cannot be so construed as to override appellant's constitutional rights.

ARGUMENT

I.

THE FIRST AMENDMENT RIGHTS OF APPELLANT HAVE BEEN ABRIDGED IN THREE IDENTIFIABLE WAYS

A. PGandE's Ability to Communicate Has Been Damaged

It is settled law that PGandE is entitled to freedom of speech. *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978). It is equally clear that PGandE's ability to use its billing envelope to protect and nurture the commercial relationship with its customers has been frustrated by the commission's order. Four time per year, for two years, PGandE's billing envelope will be used to carry the messages of a third-party, TURN.

The billing envelope is the fundamental means selected by PGandE to collect accounts receivable and to communicate with customers. PGandE has traditionally distributed its monthly newsletter, *Progress*, through its billing envelope. Under the challenged order, third party messages may preempt PGandE's own messages to customers. The commission order substantially dilutes the speech capabilities of PGandE.

Utilities are faced with intense competition from providers of other forms of fuel. Thus, they have a substantial interest in

Supreme Court Rule 34(1) (a). Appellant's jurisdictional statement, at pp. 20-22, raises issues common to the resolution of both First and Fifth Amendment questions. Appellant questions whether the extra space in monthly billing envelopes is utility property and whether the Commission may compel PGandE to carry in its property the messages of a third party. A.G.A. submits and argues that because resolution of these issues under one Amendment is integrally related to resolution under the other, this is an appropriate case for the Court to consider a question not directly presented in the jurisdictional statement.

making efforts to communicate with their customers. Utilities must preserve and strengthen the voluntary commitment current and potential customers have for the service provided by the utility.⁵

The utility also becomes a known source of information and a recognized voice expressing specific views. Periodically, the envelope must contain legally required notices on such topics as proposed rate increases, service changes, safety information and conservation suggestions.

The billing envelope has become an important, identifiable piece of property used by PGandE to keep the commercial relationship of buyer and seller alive. The direct effect of the commission order at issue is to undermine that commercial relationship.

The utility's envelope has been commandeered to carry third party messages. As the Court observed in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 254 (1974), governmental coercion of an enforceable right of access to the means of speech publication "at once brings about a confrontation with the express provisions of the First Amendment . . ."⁶

It may be argued that the utility can simply pay extra postage and include its newsletter along with the third-party messages. Merely paying extra postage to include PGandE messages with those of TURN does not avoid injury to PGandE. When PGandE's message is included with the message of another party, it is a fundamentally different message than when it is sent by itself. Including the messages of a third party with those of PGandE unalterably changes and limits PGandE's message.

⁵"Monopoly over the supply of product provides no protection from competition with substitutes for that product." *Central Hudson Gas and Electric Corp. v. Public Service Commission*, 447 U.S. 557, 567 (1980).

⁶As also noted by the Court in *Miami Herald v. Tornillo*, 418 U.S. at 257, government enforced right of access inescapably "dampens the vigor and limits the variety of public debate," citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 276 (1964).

B. PGandE's Right to Remain Free From Forced Association With the Communications of Third-Parties and to Refrain From Speaking When It Prefers to Remain Silent Has Been Violated

An essential protection afforded by the First Amendment is the right to refrain from speaking or associating with the views of others. *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). The practical effect of the commission's order is to compel both speech and an unwanted association.

The regular presence of TURN messages in PGandE's billing envelope can only cause recipients to associate the material with PGandE. This is an unwanted association because TURN messages are likely to express views contrary to those of PGandE. It is reasonable to assume that customers will not separate TURN's message from that of its courier, PGandE. The natural result is that customers will impute PGandE's concurrence and support of TURN's messages. At best, confusion is thrust upon the customer; at worst, the views of PGandE are misrepresented.

Acrimonious debate sometimes occurs between a utility and those adversaries purporting to represent the interests of some of its customers. For example, natural gas utilities typically take a longer-range view of what is a prudent investment or operating cost than those consumer advocates who seek immediate cost reductions. Placing messages critical of a utility business decision in the company's billing envelope exerts pressure on the utility to respond and answer what it considers misleading statements or ill-advised policy. This Court's decisions make it clear that no such pressure is constitutionally acceptable. A state's interest in promoting particular concepts "cannot outweigh an individual's First Amendment right to avoid becoming the courier for messages with which he disagrees." *Wooley v. Maynard*, 430 U.S. 705, 717 (1977).

This Court has recognized that free speech includes not only the right to speak one's mind, but also the right to refrain from speaking. *Wooley v. Maynard*, 430 U.S. 705; *Miami Herald Publishing Company v. Tornillo*, 418 U.S. 241.

In *Wooley v. Maynard*, the Court considered an analagous situation to the one presented here. The State of New Hampshire tried to force a driver to display the state's motto, "Live Free or Die", on his automobile license plate. The driver objected and argued that under the First Amendment he could not be compelled to carry someone else's message. In striking down the state requirement, the Court explained that "[t]he right to speak and the right to refrain from speaking are complementary components of the broader concept of individual freedom of mind." *Id.* at 714. The right to remain silent is just as fundamental to a free society as the right to speak one's mind.

The forced communications at issue here may be even more serious than that found unconstitutional in *Wooley v. Maynard*. PGandE can be required to disseminate the comprehensive, ideological discussions of a third-party group to millions of its customers. This is certainly more egregious than the limited message found offensive in *Wooley*. As recognized in a recent state court decision, compelled dissemination through the billing envelope presents "an ominous threat" to the First Amendment. *Consolidated Edison v. Public Service Commission*. No. 10762/84 (N.Y. Sup. Ct., Albany County, decided April 10, 1985).

C. The Commission Has Asserted the Right to Limit and Evaluate PGandE's Speech

The commission limitation upon the utility's right to engage in speech is constitutionally infirm. The order is based on the commission's view that the content of PGandE's speech is inadequate. The "concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976).

The commission found a compelling state interest for regulating speech, based upon a perceived need to upgrade the content of public debate on commission-related matters. The commission stated that "[i]t is reasonable to assume that

the ratepayers will benefit *more* from exposure to a variety of views than they will from only that of PGandE." Dec. No. 83-12-047, slip op. at 17; J.S. App. 17 (emphasis added). The content of PGandE's speech was deemed insufficient by the commission to provide the benefit to customers required by an efficient use of the extra space.

Commission interference with communications sent to PGandE's customers is not justified under any of the tests that allow the state to regulate speech. The tests as set forth in *Consolidated Edison v. Public Service Commission*, 447 U.S. 530, 535 (1980) only allow state regulation under the following, limited circumstances: (1) reasonable time, place or manner restrictions, (2) permissible subject matter regulation, or (3) if it is a narrowly tailored means of serving a compelling state interest.

The commission concluded that granting access to appellant's billing envelope was a permissible time, place or manner regulation. Dec. No. 83-12-047, J.S. App. pp. 20-23. The Court in *Consolidated Edison v. Public Service Commission*, 447 U.S. 530, 536, has made it clear, however, that such restrictions "may not be based either upon the content or subject matter of speech." The commission decision at issue is content based for in fact it promotes the dissemination of a particular ratepayer view. State restrictions on speech, imposed for the purpose of advancing the communication of particular information, cannot be justified as a content-neutral time, place or manner regulation.

The commission ordered the invasion of PGandE's property to advance its interest in increasing customer awareness of commission proceedings. It described its orders as making "more efficient use" of the "extra space" in the envelope. Dec. No. 83-12-047, slip op. at 28; J.S. App. 28. In effect, the commission usurped PGandE's right of speech for a perceived benefit to others. The company's messages were preempted because the commission deemed them inadequate or inefficient. This was done without any way of knowing whether the messages of TURN would actually add to customer awareness.

Subject matter regulation is only permissible under very limited circumstances. Such regulation usually involves speech which is obscene or otherwise blatantly offensive. No one has contended that subject matter regulation would be appropriate in this case.

Increasing customer knowledge of issues pending before the commission may be a worthy goal, but it is neither a compelling interest nor is it carried out through narrowly tailored means. There are many ways of providing information to consumers without implicating fundamental freedoms. The interests which the commission seeks to promote could be better served by direct funding of intervenor groups, attorney and expert witness fee awards, increased educational activities or through a variety of other means. None of these avenues involve a limitation of PGandE's constitutional rights. Nor do they involve the regulatory process in a morass of endless deliberations over which groups and which messages are worthy of inclusion in billing envelopes.

This Court should find the limitation and evaluation of PGandE's speech to constitute an unconstitutional deprivation of First Amendment rights. As noted, several states are utilizing the rationale approved in California to evaluate utility speech. Thus, the ruling in this case will clearly have a substantial impact on utilities across the country.

What is required is a categorical rule that private-party access is constitutionally infirm. As one writer has observed:

"Categorical rules thus tend to protect the system of free expression better because they are more likely to work in spite of the defects in the human machinery on which we must rely to preserve fundamental liberties. The balancing approach is contrastingly a slippery slope; once an issue is seen as a matter of degree, first amendment protections become especially reliant on the sympathetic administration of the law."⁷

⁷L. Tribe, *American Constitutional Law* 584 (1978).

II.

THE COMMISSION'S ORDER TAKES PRIVATE PROPERTY WITHOUT JUST COMPENSATION

The commission has argued that because customers of PGandE pay for the extra space in the billing envelope, the extra space should be "properly considered as ratepayer's property." Dec. No. 93887; J.S. App. 72. As such it is allegedly controlled by the government of the state. Commission's M.D., at 7. To the contrary, established law makes it clear that the billing envelope is PGandE's private property. The commission's invasion of PGandE's billing envelope amounts to an unlawful taking of that private property.

A. Utility Property Is Owned By the Utility and Not By Its Customers

The basic principle, now threatened by the Commission's order, is that title to utility property vests in the utility. The fact that the property is devoted to public service, and that its costs are considered in setting rates, does not alter the private character of utility property. *United Railways and Electric Company of Baltimore v. West*, 280 U.S. 234, 249 (1980).

This case necessarily implicates the constitutionality of a state regulatory body exercising enabling legislation to transfer property rights from private owners to a special interest group.⁸ The "extra space" in PGandE's billing envelope was, prior to the Commission's order, understood and treated by all interested parties as an integral part of PGandE's property. The spectre of regulatory commissions using their public-protection powers to grant positive interests in utility property

⁸This case does not involve a challenge to the power of eminent domain. Utility property may be taken for public use when just compensation is paid. In considering the application of the Fourteenth Amendment to cases of expropriation of private property, the question of what is a public use is a judicial one. *Cincinnati v. Vester*, 281 U.S. 439, 444 (1930).

to third-party groups has never been permitted by this Court in the past.⁹

In a long line of cases, this Court has consistently held that persons purchasing service from state-regulated utilities obtain no cognizable interests in the property purchased and used by the utility in providing that service. *Smyth v. Ames*, 169 U.S. 466 (1898); *Board of Public Utility Commissioners v. New York Telephone Co.*, 271 U.S. 23 (1926). This fundamental rule of law is an indispensable element in the system of privately-owned public utility companies.

Utility management has the right and responsibility to conduct the business affairs of the utility. Regulatory agencies are neither empowered to make day-to-day business decisions nor to manage the operations of the utility business. As this Court noted in *Missouri ex rel. Southwestern Bell Telephone Company v. Public Service Commission of Missouri*, 262 U.S. 276, 289 (1923):

It must never be forgotten that while the state may regulate, with a view to enforcing reasonable rates and charges, it is not the owner of the property of the public utility companies, and is not clothed with the general powers of management incident to ownership.

B. PGandE's Property Was Unlawfully Taken

Property is "taken" when the owner is made unable to

⁹It should be noted that TURN, or any other interest group, cannot be considered "the public". Even if TURN represented all customers of PGandE (which it does not), such class of persons would not constitute "the public". For example, *Black's Law Dictionary* 1393 (4th ed. 1968), defines "public," in pertinent part: "Pertaining to a state, nation, or whole community; proceeding from, relating to, or affecting the whole body of people or an entire community. Open to all; notorious. Common to all or many; general; open to common use. [Omitting citations.] Belonging to the people at large; relating to or affecting the whole people of a state, nation, or community; not limited or restricted to any particular class of the community. [Omitting citations.]"

use that property as the owner wishes and to exclude others from the property. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982). The Constitution protects "every sort of [property] interest the citizen may possess." *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945).

In direct confrontation with legal precedent and sound public policy, the commission has defined new property rights and assigned them to a specific organization purporting to represent some consumers.¹⁰ It has ruled that any unused space remaining in the utility's billing envelope (after the bill and any legally mandated notices are included) belongs to PGandE customers.¹¹ The envelope itself, according to the commission, remains the property of the utility. To separate any facet of the ownership interest and transfer it to the rate-payers, as a consequence of paying rates, would defeat the utility's ownership interest and violate the principle that rate-payers pay for utility service, not for the property used to provide that service.

If the commission decision is allowed to stand, commissions will be free to declare that any property used by a utility to provide service belongs to the state or to an undefined "public". This could include anything which is found to have 'unrealized economic value'. As one dissenting member of the commission rhetorically asked, "what are the consequences beyond the circumstances presented in this case? The face of every utility-owned dam, the side of every building, the surface of every gas holder rising above our cities, and the bumpers of every utility vehicle . . . have excess space and 'economic advertising value'." Dec. No. 83-12-047, slip op.

¹⁰PGandE's large body of customers may have conflicting interests. The interests of large industrial and commercial users are frequently in direct conflict with those of the small residential user. Also, in a large utility system the interests of users located in concentrated urban areas may vary from those in rural areas.

¹¹The Commission vaguely described the interest of the customers as an "equity" right. Note that little indication is given of what that term means. Dec. No. 83-12-047, slip op. at 4; J.S. App. 4.

at 40. (Bagley dissenting) J.S. App. 40. Despite references to "extra space" in the billing envelope, the direct effect of the commission order is that the billing envelope is itself taken and made to carry the messages of a third-party.¹²

It is irrational to separate, for purposes of establishing and enforcing legal rights, a physical object (to which property rights admittedly attach) from one of its characteristics. "Extra space" is merely an elliptical manner of referring to one of the characteristics of the billing envelope. An envelope can carry. This is why it has financial value, and why the utility purchased it. The concept of "extra space" is a function of a quirk in postal rates and regulations. Such space could not exist if postal regulations were modified. Long-standing Fifth Amendment construction precludes the Commission from granting a specific interest group a property right of any kind in utility property.

¹²"The power to exclude has traditionally been considered one of the most treasured strands to an owner's bundle of rights." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982).

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of California upholding the decision of the California Public Utilities Commission, which is inconsistent with the First and Fifth Amendments to the United States Constitution, should be reversed; and the commission's decision should be vacated.

Respectfully submitted,

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